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CASE NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LIDA K. MAYFIELD,
Plaintiff-Appellant,
vs.
AUBURN UNIVERSITY, BOARD OF TRUSTEES OF AUBURN UNIVERSITY, ET AL.,
Defendants-Appellees

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR CERTIORARI FEDERAL CIVIL CASE

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80 pp

QUESTION PRESENTED

Once a Teacher in a State University has met all the written requirements for tenure at the University and is nominated for tenure by the faculty from within her department, is that teacher entitled to due process before the tenure and promotion committee which has the responsibility to decide whether or not that teacher is granted tenure?

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NO. 83-7687

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LIDA K. MAYFIELD,

Plaintiff-Appellant,

vs.

AUBURN UNIVERSITY, BOARD OF TRUSTEES OF AUBURN UNIVERSITY ET AL.,

Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The unreported memorandum opinion of the Court of Appeals for the Eleventh Circuit is reproduced as Appendix "A" hereto. The unreported opinion of the United States District Court for the Middle District of Alabama is reproduced as Appendix "C" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 3, 1984. A timely Petition for Rehearing and Suggestion that Rehearing be En Banc was denied on February 11, 1985 (a copy of the order denying rehearing is reproduced as Appendix "B" hereto), and this Petition for Certiorari was filed within ninety (90) day of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

42 U.S.C.S. SECTION 1983

SECTION 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

"Every person, who under color color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in

equity, or other proper proceeding for redress."

U.S. CONSTITUTION AMENDMENT XIV, SECTION 1

SECTION 1. CITIZENS OF THE UNITED STATES.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONCISE STATEMENT OF THE CASE

The Appellant herein and the Plaintiff in the court below, LIDA K. MAYFIELD, filed her complaint in the United States District Court, Middle District of Alabama, on May 24, 1982. Said complaint was twice amended. In general, Appellant's complaint, as amended, sought the following relief:

(1) Declaratory judgment to the effect that Appellant had acquired tenure at Auburn University and, as such, was

entitled to all the rights, privileges, and benefits of tenured faculty members.

(2) Injunctive relief against the university, restraining and enjoining the Appellees from terminating Plaintiff's employment at the end of the 1981-82 academic year.

(3) Declaratory judgment that Appellant was denied procedural and substantive due process and that she was deprived of the rights, privileges and immunities secured to her by the Constitution of the United States, specifically, the Fourteenth Amendment, by the Defendants' while acting under color of state law.

(4) Declaratory judgment that Appellees had breached their contract with Appellant by failing to grant her tenure after seven years of continuous full time service and by failing to follow the procedures established by the faculty handbook for the termination of tenured appointments.

(5) Declaratory judgment that Appellant has been discriminated against by the Appellees based upon her sex.

(6) Declaratory judgment that Plaintiff had been discriminated against based upon her sex in violation of the Equal Pay Act of 1963.

(7) In addition to the above, the Appellant sought damages for breach of

contract, violation of civil rights, backpay reinstatement and attorneys fees and expenses of litigation under 42 USC. 1988.

The trial court granted a partial summary judgment ruling that no damages could be recovered under Alabama law for breach of contract, but subsequently, amended said judgment to provide that declaratory and injunctive relief could be granted even though damages could not.

On June 10, 1982, the court entered an opinion and order denying Plaintiff's motion for preliminary injunction.

The case came to trial on October 11, 1983, before the Honorable Robert E. Varner, without a jury in the Federal

Courthouse in Opelika, Alabama. On October 18, the trial was completed and the District Judge ruled from the bench that judgment on all issues was to be entered in favor of the Appellees, Auburn University, et. al. He subsequently entered an opinion and order on November 18, entering judgment in favor of Appellees and taxing costs against the Appellant. The Eleventh Circuit Court of Appeals affirmed without opinion under Rule 25 on December 3, 1984. Motion for re-hearing was denied on February 11, 1985. This application is filed within ninety days of said denial.

The relevent evidentiary facts can be briefly stated as follows:

On June 15, 1970, the Appellant, LIDA MAYFIELD, was hired by Auburn University as a full time instructor in the music department. After she served eight years as a full time instructor she was told by her department head, Dr. Hinton and the Vice President of Academic Affairs that she could not be considered for tenure unless she obtained a masters degree. She then went to Georgia State University and obtained her masters degree and was subsequently nominated for tenure by the music department faculty. The tenure nomination was forwarded to the Tenure and Promotion Committee in accordance with the published policies of Auburn University. Said policy as written in the Faculty Handook states in part as follows:

> Faculty members on Probationary appointments with the rank of assistant professor or higher become eligible for tenure after the completion of a probationary period of meritorious performance. The total length of the probationary period should not exceed seven years of full-time service. Some of this service may have been spent at the rank of instructor. A minimum probationary period of five years should be observed prior to nomination except as specified immediately below.

The Tenure and Promotion Committee denied tenure to Appellant in 1981, eleven years after she began teaching at

Auburn, on the grounds that she was not "compatible" with certain faculty members. The Tenure and Promotion Committee relied entirely upon Ex Parte, secret letters which were solicited by the Department Head Hinton from the faculty members within the music department which had nominated her for tenure. The Tenure and Promotion Committee made its decision without having heard at all from Professor Mayfield. In fact, the Appellant did not even know when Hinton had placed her up for tenure consideration. The tenure procedure provided no means whereby Appellant could appear before the Committee to rebut any charges or allegations of incompatibility or even to know whether any such charges or allegations had been made and, if so, who made them.

Following Appellant's rejection, she appealed the decision to President Funderburk in accordance with her "appeal rights" afforded her by the handbook. Instead of deciding her appeal, he sent it back before the Tenure and Promotion Committee who had made the inital decision.

The tenure denial resulted in an automatic discharge from employment because Appellant had been at Auburn for eleven years and Auburn supposedly subscribed to the rule referred to in the District Court's opinion as the "seven-year-up-or-out" rule.

REASONS FOR GRANTING THE WRIT

The District Judge ruled that Appellant was not entitled to due process because she did not have tenure. We submit that this was error because she had met all the written requirements for tenure and was being considered for it under written University procedures. The District Court rested its decision on Board of Regents v. Roth, 408 U.S. 564, 33L.Ed.2d. p.548, 92 S Ct. 2701 and Perry v. Sindermann, 408 U.S. 593 33 L.Ed.2d 570, 92 S Ct. 2694. However, both of these cases deal with the question as to when due process rights are due non-tenured faculty members. We submit that these decisions, when read with the other decisions cited below, compel due process rights and hearings for faculty

members who have, through compliance with written tenure procedures, placed themselves into a class of persons "entitled to a benefit" which amounts to a "property right" within the meaning of the due process clause of the United States Constitution.

Tenure to a Professor is of vital importance to his future career. If it is granted he receives numerous fringe benefits and more importantly, protection against removal from his job without cause. At Auburn, if tenure is not granted within seven years the result is discharge. It follows that tenure is a vital "benefit", the grant or denial of which can vitally affect a teacher's entire future. Should a state be allowed then to grant or deny such a benefit to

those who have qualified to be considered for it without affording them the protections of due process?

Sindermann clearly holds as follows:

> "A person's interest in a governmental benefit is a "Property interest" subject to procedural due process protection if claim of entitlement to the benefit is supported by rules of the agency affording the benefit or by mutually explicit understandings." Perry v.Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694.

Why should "Tenure" itself be excluded from the meaning of a "benefit" as expressed in Sindermann?

It is submitted that a College teacher who is being considered for tenure is no different from a non-lawyer who is seeking admission to the bar or a lawyer who is seeking to practice in a particular Court. Thus, in Schware v. Board of Bar Examiners, 353 U.S. 232, 238, 1 L. Ed. 2d. 796, 801 77 S. Ct. 752, 64 ALR 2d 288, the Court held that a state in regulating eligibility to a type of professional employment cannot foreclose a range of opportunities "in a manner that contravenes due process." See also Board of Regents v. Roth, supra.

See also Willner v. Committee on Character and Fitness which holds:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796; Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S. Ct. 1175, 10 L Ed. 2d 224 (1963).

Tenure at a State University is such a governmental benefit as the Court referred to in Roth and Sindermann supra.

We do not argue that the "Benefit" cannot be denied for various reasons such as "incompatability". We simply contend that, whatever the grounds for exclusion may be, the Constitution affords a person the right to be heard and To refute those grounds at some kind of hearing.

Lida Mayfield never had any kind of hearing before the Auburn Tenure and Promotion Committee. She was denied tenure by the Committee as pointed out in the District Court's opinion for "Lack of compatability" with her colleagues. The Committee relied entirely on Ex Parte letters from faculty members who were communicating in secret. Lida Mayfield had no chance to refute the accusations of lack of compatability before this Committee and herein lies the error in

this case. A decision based on Ex Parte materials was expressly held improper and a denial of Due Process in the Willner case, supra. Willner did not necessarily have a right to practice law just as Mayfield might not have had a right to be granted Tenure. The right that exists to both Willner and Mayfield however, is the "claim of entitlement" to the benefit, Perry v. Sindermann, supra.

> "We are not here concerned with grounds which justify denial of a license to practice law, but only with what procedural due process requires if the license is to be withheld." Willner v. Committee on Character and Fitness, 373 U.S. 96, 102, 33 S. Ct. 1175, 1180.

"This is the problem which Chief Justice Taft adverted to in Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494 involving an application of a certified public accountant to practice before the Board of Tax Appeals. Chief Justice Taft writing for the Court said:

"We think that the petitioner, having shown by his application that being a citizen of the United States and a certified public accountant under the laws of a State, he was within the class of those entitled to be admitted to

practice under the Board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the board provide that "the board may in its discretion deny admission, suspend or disbar any person." But this must be construed to mean to exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." Id., p. 123, 46 S. Ct. p217. Willner, supra p102 (US), p 1180 (S.CT.). Underlining added.

Lida Mayfield has clearly shown that she was "within the class of those entitled to be admitted" to Tenured status under the written guidelines of Auburn University and "should not have been rejected upon charges of "incompatability" without "Giving her an opportunity by Notice for hearing and answer." Goldsmith, supra.

If a state employee is entitled to due process during a decision making procedure which can result in his termination, then what does due process require of the State? This question was recently answered by the Court in Cleveland Board of Education v. Loudermill, et al. (Cite unavailable, decided March 19, 1985) Where Mr. Justice

White held that "some kind of hearing" is required.

THE FEDERAL QUESTION IS SUBSTANTIAL

Sooner or later every college teacher or professor who has entered the field of higher education will face the tenure issue. Tenure, for these people will either be a stepping stone to a long and successful career or, if denied, a stumbling block which can abruptly end their employment and stand in the way of similar future employment. Thus, the tenure decision is one of the vital points in the career of virtually every college teacher at an institution which has a tenure policy. A decision which impacts significantly upon a person's livelihood and employment should not, at

least at a State institution, be made on purely arbitrary grounds. The system as it now exists amounts, in many cases, to no more than a popularity contest. In the instant case tenure was denied on the basis of several secret letters submitted by faculty members. Some of the matters in the letters were simply not true and this was demonstrated in the trial of the case. Had the Appellant been able to confront her "accusers" so to speak in a hearing before the Tenure and Promotion Committee it might well have rendered a different result. Had those faculty members who wrote letters under a cloak of secrecy been required to express their views openly at a hearing, it is likely that some of them would not have had the fortitude to do so.

Much can be said for keeping the Court at arms length from the internal affairs of a university. On the other hand, an institution financed by tax payers dollars should not be allowed to circumvent the Constitution in dealing with its employees.

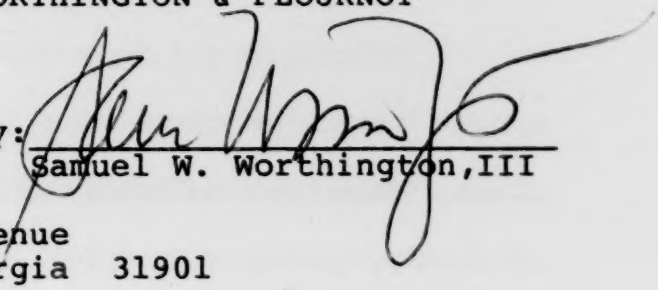
A ruling requiring due process in tenure considerations would result in these decisions being made on the basis of merit, job performance and other more objective criteria. It would be a monumental benefit to college teachers and the teaching profession in general. How can moral values, such as fundamental fairness, be instilled by a university into its students when it is not even required to be fair within its own administrative arena?

CONCLUSION

Appellant respectively requests that the Petition for Certiorari be granted and that the decision of the Eleventh Circuit Court of Appeals be reversed.

Respectfully submitted,

WORTHINGTON & FLOURNOY



By: Samuel W. Worthington, III

904 Second Avenue
Columbus, Georgia 31901

CERTIFICATE OF SERVICE

I, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served the foregoing Petition for Certiorari upon all parties hereto by depositing a copy thereof in the United States mail, with adequate postage affixed to assure delivery, and properly addressed to their counsel of record, to-wit:

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ATTORNEYS FOR APPELLEES

This the 10th day of May, 1985.

Samuel W. Worthington, III
Of Counsel for Appellant

APPENDIX A.

In the United States Court of Appeals for the Eleventh Circuit.

Lida K. Mayfield, Plaintiff/ Appellant v. Auburn University, Board of Trustees of Auburn University, et al., Defendant/Appellees. No. 83-7687 D.C. No. 82-110

Filed December 3, 1984.

Appeal from the United States District Court for the Middle District of Alabama and submitted December 3, 1984.

Before: GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

"Costs taxes against plaintiff-appellant."

*Honorable Homer Thornberry, U.S. Circuit Judge, sitting by designation.

Judgement Entered: December 3, 1984
For the Court: Spencer D. Mercer, Clerk

By: _____
Deputy Clerk

APPENDIX B.

In the United States Court of Appeals for the Eleventh Circuit.

Lida K. Mayfield, Plaintiff/ Appellant v. Auburn University, Board of Trustees of Auburn University, et al., Defendant/Appellees. No. 83-7687 D.C. No. 82-110.

Filed February 11, 1985.

Appeal from the United States District Court for the Middle District of Alabama.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion December 3, 1984)

Before: GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

John Godbold
United States Circuit Judge

*Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX "C"

In the United States District Court for the Middle District of Alabama, Eastern Division

Lida K. Mayfield, Plaintiff/ Appeallant v. Auburn University, et al. Defendants/Appellees. No. 82-110-E.

Filed November 18, 1983.

OPINION

This cause is submitted on the pleadings and proof offered in open Court. The Court has jurisdiction pursuant to 28 U.S.C. §1331.

Plaintiff, Lida K. Mayfield, filed suit on May 24, 1982 against her former employer, Auburn University, alleging five causes of action, as follows:

(1) Plaintiff seeks a declaratory judgment that, having been employed without tenure in excess of seven years in violation of Auburn's alleged policy of termination or tenure within seven years, Plaintiff is entitled to a declaratory judgment that she is a tenured assistant professor at Auburn University with back pay and benefits.

(2) Plaintiff contends that she had reasonable expectation of continued employment which was terminated without due process of law for which she claims reinstatement with back pay and benefits and damages because of the deprival of her property right to employment without due process of law and alleged bad faith of Dr. Littleton, Professor Hinton and

Dr. Funderburk under the authority of Wood v. Strickland, 420 U.S. 308.

Plaintiff claims that the principle, that one not terminated within seven years of his employment is tenured without other procedures, is written into her contract with Auburn and that Auburn University breached that contract by terminating her contract after she had been employed without tenure for over seven years. She claims the right to enforce said contract in this Court under the doctrine of pendente litigation.

(4) She claims that she was discriminated against because of her sex in promotion and termination, in violation of 42 U.S.C. § 2000e.

(5) She claims a violation of the Equal Pay Act.

The Defendants deny that they discriminated against Plaintiff Mayfield, deny that they had a policy or a rule requiring the granting of tenure automatically to those employed without tenure for over seven years, deny that the American Association of University Professors' (hereinafter AAUP) principles adopted by the University provided for automatic tenure to employees untenured for over seven years, deny that their contract with Plaintiff incorporated an agreement for automatic tenure under any circumstances, and contend that Plaintiff was terminated because, after Auburn had given Plaintiff two extra years to qualify for tenure consideration by

obtaining a master's degree, she was denied tenure because of an adverse vote of the tenured members of the faculty in her department. Defendants contend that Plaintiff was not at pertinent times qualified for tenure, and they deny the charges of unequal pay and breach of contract. Defendants also plead the statute of limitations.

Counts 1, 2 and 3 rest upon Plaintiff's theory that, by virtue of employment for seven years without tenure, Plaintiff was entitled to a de facto tenure independent of the requirements and procedures for attaining tenure set out in the Auburn Faculty Handbook (Defendants' Exhibit 32, p. 19). The Statement of Policy of the Board of Trustees on Academic Freedom, Tenure, and

Responsibility, Plaintiff's Exhibit 399, as adopted February 20, 1971, is the governing policy under which Plaintiff taught at Auburn. That statement contained the following:

> "The Board *** subscribes to the principles *** of academic freedom and academic tenure as described in the 1940 Statements of Principles of the American Association of University Professors. The Board holds strongly that correlative with the rights of academic tenure and academic freedom is the responsibility of the Faculty to the University so the University can fulfill its obligation to its students and to society. The

specific details set forth in the statement 'Appointment to the Faculty, Promotion and Tenure', as revised, constitute the policy and procedural conditions under which tenure is awarded by Auburn University."

The Statement of Principles for Academic Freedom and Tenure of AAUP is included in Plaintiff's Exhibit 395 and provides (Page 2, Academic Tenure), (a) (1) that the terms of every appointment should be written, and the following:

"(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period <u>should</u> not exceed 7 years ***." (emphasis added).

Nothing in the Auburn Faculty Handbook (Defendants' Exhibit 32), in any documents adopted by the Auburn Board of Directors, or in any contract of the Plaintiff or evidence of extension thereof provides that an instructor who fails to meet University requirements for tenure will attain the same simply by lapse of time.

The Faculty Handbook (Defendants' Exhibit 32) is specific that "temporary faculty are not eligible for tenure or promotion" (p. 19); that "probationary appointments are assigned to faculty who *** have demonstrated their aptitude for becoming tenured ***" (p. 19); that "tenured appointments are assigned to faculty who have completed an appropriate

probationary period and who, following recommendation and review in accordance with University policy and approval by the President, have been awarded tenure" (p. 19); that the faculty is composed of instructors and those with professorial rank (that is, assistant professors, associate professors and professors) (p. 20); that, for promotion from instructor to assistant professor, "the candidate should have a strong academic record and should have completed the terminal degree 1/ *** or the equivalent in training, ability and experience" (p. 20); that

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1/ It is agreed that the terminal degree for an assistant professor in this case was a master's degree.

"the normal progression to Tenured Status of a faculty member is from a Proba-

tionary appointment" (p. 20); that "faculty members on Temporary appointments may not achieve tenure" (p. 20); that Probationary faculty "with the rank of assistant professor or higher become eligible for tenure after completion of a probationary period of meritorious performance," which "should not exceed seven years of full-time service" some of which "may have been spent at the rank of instructor" (p. 23); that the department head should "consult with representative tenured members of the department *** and decide whether to initiate a nomination for " tenure (p. 23); and that the department head, following a "secret poll of all tenured faculty of the department," shall obtain letters of evaluation "from tenured members of the department, assessing

representative evaluations, ***" and submit the results of the poll, the letters, the evaluation of the department head, and written justification for the nomination in instances like this to the candidate's dean. Thereafter, the procedure is that the material is then submitted, together with recommendations for or against tenure by the department head and the dean, to the Tenure and Promotion Committee for review, and its evaluation with the material is submitted to the President (p. 23) for final action on tenure.

For more than seven years after her initial appointment in 1971 (which, in violation of the specifications in the Faculty Handbook, was for three years either permanent or probationary),

Plaintiff made no effort to comply with the requirements for attaining professorial rank. After three years of having erroneously classified Plaintiff as permanent or probationary, Dr. Hinton, in conformance with the requirements of the faculty handbook (Defendants' Exhibit 32, p. 19), classified Plaintiff as a temporary employee, a classification which she held until after having earned her master's degree in 1981 when she was immediately classified as probationary. It was generally conceded that, while teaching, Plaintiff and her students received their share of the academic honors and that Plaintiff was an efficient teacher and received regular financial recognition by increases in salary.

It was contended by the Defendants, and this court finds, that Plaintiff was not exposed to the tenure process prior to 1981 because she had not acquired a master's degree and that she was classified probationary and submitted for evaluation for tenure in due course after she earned the degree. This Court further finds that Plaintiff was ultimately denied tenure and given notice of termination effective at the end of the following school year because of her lack of compatibility with her colleagues. The testimony of the tenured faculty in the Music Department showed overwhelmingly that, while Plaintiff participated in group music educational programs on many occasions, she refused on many occasions to inconvenience herself, that she was publicly and unnecesarily

critical of fellow faculty members in a way so as to weaken the program, and that she was extremely harsh in her criticism of some of her students. Elements to be considered in tenure decisions are, among others, (1) compatibility with colleagues, (2) compatibility with departmental mission and goals, and (3) ability and willingness to engage in shared tasks that a departmental group must often perform (Defendant's Exhibit 32, p. 23).

This Court further finds that Plaintiff, having knowledge of the pertinent provisions of the Faculty Handbook and having received her classifications as a temporary employee as shown on her UPO statements from 1974 through 1980-81, had no reason for, or

right to, an expectation of continued employment such as Plaintiff insists was demonstrated in Perry v. Sindermann, 408 U.S. 593. According to the Faculty Handbook, her failure was threefold: (1) She did not, until 1981, attain the terminal degree; (2) she did not attain probationary status with requisites described in the Handbook until 1981; and (3) she did not acquire the affirmative vote of the tenured faculty in her department. The fact that Plaintiff was classified before 1974 as other than temporary gave her no right to a classification denied her by the Faculty Handbook. In any event, she was notified in 1974 that her classification was temporary as required by the Handbook, and she did not file suit until May, 1982, long after that claim was barred by

limitations. Even if Dr. Hinton gave Plaintiff encouragement to believe that she would achieve tenure, she knew the rules and the objectives to be accomplished before attaining tenure.

The fact that the Dean of Engineering was given immediate tenure upon employment or that two architects, without a master's degree but with 15 or 20 years' experience in the industry, were employed as assistant professors is of little aid to the Plaintiff either in establishing a de facto tenure or in showing sex discrimination. Exceptions to or violations of the usual rule do not vitiate the rule. If a violation of a rule damages a person, the law may provide redress, but there is no showing of damage to Plaintiff from any technical

variation in selection, promotion or tenure of any faculty member. There is no written mandatory alternative of termination or tenure at the end of seven years' probation. Relative thereto, the Auburn Faculty Handbook contains the following provisions (Defendant's Exhibit 32);

"Temporary faculty are not eligible for tenure ***. *** All faculty at the rank of instructor are Temporary appointments." (p. 19)

"Probationary appointments are assigned to faculty members who *** have demonstrated their aptitude for becoming tenured."

"The candidate (for Assistant Professor rank) *** should have completed the terminal degree *** or the equivalent in training, ability and experience." (p. 19) (emphasis added)

"The normal progression to tenured status is from a Probationary appointment. *** Faculty *** on Temporary appointment may not achieve tenure." (pp. 22-23)

"Faculty on Probationary appointment with rank of Assistant Professor or higher become eligible for tenure after a probationary period of meritorious performance. The total length of the probationary period shall not exceed seven years ***. *** Some *** may have been at the rank of instructor." (p. 23). Qualities to be considered in determining

tenure are listed (p. 23), as is the procedure (p. 23).

Nothing in any rule explicitly provides for tenure in the event of violation of the rule. While the rule contemplates a consideration of tenure within six years and a determination of termination or tenure within seven years of initial employment, it provides no forfeiture or accrual of rights by either party in the event no tenure determination is made within seven years.

Predictably, AAUP has construed the rule to require de facto tenure for the teacher not terminated within seven years. This view, of course, is not binding on this Court and is no more entitled to an inference of propriety than is the

University's view to the contrary. In fact, the University's interpretation may be entitled to strong deference. Udall v. Tallman, 380 U.S. 1, 16. Rule constructions adopted by agencies whose duties involve the enforcement of the rule are entitled to a presumption of regularity. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 405.

If the so-called "7-years-up-or-out rule" 2/ is written by implication into

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2/ The rule is not to be confused with the State law of Alabama regarding public schoool teachers (CODE OF ALABAMA) which provides that, if untenured public school teachers' contracts of employment are renewed each year for over three years, tenure is granted by operation of law.

The rule has been referred to as the "3-year-up-or-out" rule. No such law is applicable to institutions of higher learning in Alabama.

each employee's contract, so also is the for attaining tenure 3/, including a usual requirement of a master's degree, a probationary period and a majority vote of a representative group of the tenured faculty of the subject's academic department. The Handbook leaves room for substitution in exceptional cases, but these are unusual requirements. Most of the Music Department tenured faculty, male and female, wrote letters opposing Plaintiff's tenure. These were the strongest negative letters Dr. Littleton has seen in his years as Chairman of the University Tenure and Promotion Committee. Plaintiff did not seek the required

master's degree until she had been employed for over seven years without tenure or professorial rank. She was then required to do so because Dr. Littleton, prompted perhaps by another lawsuit, specifically notified Dr. Hinton to do so as to Plaintiff. Until prompted by Dr. Hinton in 1978, Plaintiff showed no interest in promotion, tenure or the required terminal degree.

3/ It is not insisted, nor can it be logically, that correspondence between Auburn Dean of Academics, Dr. Littleton, and the AAUP, of which Plaintiff had no knowledge until after this suit was filed, is written by implication into her contract.

Her insistence that she had an expectancy of tenure after seven years'

employment is without merit. Never during her first seven years did Plaintiff take any steps to obtain her master's degree. At the end of her seventh year of employment, Plaintiff did not have the educational qualifications or the equivalent in training, ability or experience to attain professorial rank as required for tenure. She was ineligible for consideration for tenure at the end of her seventh year. Yet, Plaintiff contends that, because the University did not terminate her at that time, it forfeited the right to terminate her later because of her later failure to qualify. In short, Plaintiff contends that, because the University gave her a second chance to qualify for tenure, it has forfeited its right to terminate her even though she has continued to fail to

qualify for tenure. It is difficult for this Court to construe the University's failure to terminate within seven years and the University's second effort to allow Plaintiff to qualify for tenure as being discriminatory against the Plaintiff.

If the 7-years-up-or-out condition were written into Plaintiff's contract, the continuation of employment after the seven-year period with neither tenure nor termination effected a waiver of the provision, and the parties continued the relationship under a new contract exclusive of the allegedly implied contradictory provision of the original contract. The fact that 20-odd other employees have been allowed additional time to complete the requirements is

significant only in that it demonstrates that Auburn is not insisting on its right to terminate within seven years but is allowing deserving faculty members additional time to qualify for tenure as it did for Plaintiff Mayfield. The Plaintiff submitted no evidence that anyone else in the history of Auburn had attained tenure based only on length of service. The evidence is to the contrary.

Dr. Wilson of the Sociology Staff at Auburn testified that Plaintiff and her mother, her father, her mother-in-law and her husband compiled facts from Auburn records and gave those facts to Dr. Wilson and Dr. Henderson; that those facts were accurate; that there seems to be a preference for men to teach in

summer but that he does not know how many of either sex wanted to teach in summer. Dr. Wilson reported that he had compared the salaries of a number of men with the salaries of a number of women, that is, the salary of a named man with that of a named woman, and the man in each couple was paid more than was the woman. This comparison was of little value to the Court since there were no substantial facts given from which this court might judge the relative value of the partners to the University. The witness furnished little information as to qualifications, distinctions, special services to the University or other assets or demerits of any subject faculty member.

Professor French, a female, tenured Associate Professor of Sociology and

Anthropology at Auburn, testified that she counted subjects of various reports furnished her by Plaintiff as follows: (a) That, between 1970 and 1980, nearly all department heads at Auburn have been men; (b) that the percentage of women employees on excessive probation* is about four times the number of men on excessive probation; (c) that, in the 1972-73 school year in the Music Department, there were one female and 11 male assistant professors, one female and five male associate professors and one female and one male professors; (d) that, in the 1980-81 school year, four women and 27 men chaired University faculty committees and 33 women and 214 men served on those committees; and (e) that, in the 1981-82 school year, three women and 28 men chaired committees and 37

women and 214 men served on committees. Professor French also testified that the Auburn Directory shows that more males than females held more administrative positions in each school, in the administration and on the Board of Trustees. She testified that she knew nothing of how many of what sex were qualified or available for those jobs or whether the majority of such holders of such positions held doctor's degrees. Professor French's statistics were of little help as the only fact considered was the relative number of each sex in particular positions.

Dr. Henderson, an expert in computers and statistics from Richmond, Indiana, having applied statistics and a computer to information he says Plaintiff

gave him from Auburn University files, gave his opinion that Auburn University

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*Those who have been on the faculty without tenure for over 7 years.

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discriminated against women in salaries. He testified that his computerized analysis involved over 6000 differentials but he admits that his computations do not consider important standards such as seniority, the length or quality of prior experience, age or the available work force. The statistics show only that more men are more active on the Auburn faculty than are women, and they are paid more. Dr. Henderson testified initially that the cards from which he drew his data contained a few obvious errors which he corrected and that they were minimal. On cross-examination, however, he

admitted a series of other errors in the data sheet which Plaintiff had furnished Defendants as being the data from which Dr. Henderson's calculations were made. He admitted that the data sheet (Plaintiff's Exhibit 16) was erroneous but then said he did not use that data but corrected these errors in a data sheet he left in Richmond. Upon being given an opportunity to obtain it, he did not do so. This left the Defendants and the Court with no way to check his figures or his conclusions, though Plaintiff had purported to furnish the data from which Dr. Henderson's calculations were made. Dr. Henderson's original admission of a few minimal errors which he corrected in his basic data, alone, had little effect on the creditability of his testimony or his

calculations. His original admission of minimal errors coated his calculations and opinions with an air that he was trying to be fair and that, with the computer's help, he had corrected virtually all of the errors. However, when on cross-examination he was forced to admit several hundred thousand dollars in errors in summing up the income of male faculty members compared to virtually no summary error in the income of female faculty members, the credibility of Dr. Henderson's calculations suffered a rather severe jolt. When Dr. Henderson then testified that he knew of these errors and corrected them in another data sheet while furnishing the erroneous data sheet to his associated attorneys for the information of the adverse side, Dr. Henderson's personal

credibility also suffered a severe jolt. His error, if it were an error, prevented the Defendants' experts and attorneys and this Court from appraising his figures and his calculations. Dr. Henderson's failure to disclose substantial errors while conceding minimal error dulls the credibility of all his testimony. It is significant that, of the 22 obviously erroneous entries of salaries shown on the data sheet (Plaintiff's Exhibit 16), all entries except two overstate the salary of the male subject and those two entries concerning female subjects overstate one subject's income and understate the other in about the same amount. It is interesting to speculate how Dr. Henderson, a statistician, would calculate the likelihood that so many innocent errors would so favor his

client's interest. Dr. Henderson says his figures were accurate and that only the print-out was erroneous. It is almost inconceivable that the calculator could so erroneously have recorded the figures in its print-out while producing a result based on accurate figures. This Court is of the opinion that neither Dr. Henderson nor his expert conclusions are worthy of belief.

Plaintiff offered evidence that she, her husband and her father were nonrenewed in the same year. She claims this shows bad faith. This Court is of the opinion that bad faith is not a federal cause of action and adds nothing to Plaintiff's claim absent proof of a cause of action.

Plaintiff offered evidence that four men with only bachelor's degrees were tenured in the Department of Architecture and Fine Arts. Further evidence, however, showed that all these men had extensive professional experience after a bachelor's degree in a five-year architectural course and that this practical experience was most valuable to the School of Architecture where experience was most valuable to the School of Architecture where they taught. In contrast, Plaintiff's experience was limited primarily to musical performances in which she participated while a student and during her years as an instructor at Auburn.

In United States Postal Service v. Aikens, _____ U.S. _____, 75 L.Ed.2d

403, 103 S.Ct. _____ (April 4, 1983), the Supreme Court recently reaffirmed its earlier decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-256 (1981), by holding that, in any employment discrimination action under Title VII, the plaintiff bears the ultimate burden of proving discrimination by a preponderance of the evidence at all times during the litigation. The Supreme Court, in Aikens, clarified the distinction between the burden of going forward and the ultimate burden of proof.

In Aikens, the plaintiff, a black male, claimed that the Postal Service had discriminated against him on account of his race by consistently promoting less qualified white persons over him during an eight-year period. In support of this

claim, Aikens presented both circumstantial and direct evidence. First, he demonstrated that his education, training, supervisory seniority and performance evaluations were substantially superior to the white employees advanced ahead of him. Second, he introduced testimony that the person responsible for the promotion decisions at issue had made "numerous derogatory comments about blacks in general and Aikens in particular." Aikens, supra, 75 L.Ed.2d at 409, n. 2.

After receiving this circumstantial and direct evidence and in accordance with the framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the District Court then shifted the burden of

going forward to the defendant to articulate the reasons for its actions. The Postal Service explained that Aikens was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience.

After receiving the defendant's explanation, the Court required Aikens to prove that the Postal Service's proffered explanation was pretextual. In other words, the ultimate burden of proof and persuasion on the issue of whether the defendant discriminated against the plaintiff remained at all times during the trial with the plaintiff. Aikens, supra.

In Aikens, the Supreme Court held that a plaintiff can satisfy this ultimate burden of proof in one of two ways:

> "Either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." Aikens, supra, at 410-411 (emphasis added).

In either case, the plaintiff must satisfy his burden by a preponderance of the evidence. As the Supreme Court noted in Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978), the defendant's burden in a Title VII

case is, at most, one of "production" or going forward with the evidence. The defendant is not required to prove the absence of discrimination or a discriminatory motive. The defendant's burden is met if he "explains what he has done" or "produc(es) evidence of legitimate, nondiscriminatory reasons." Sweeney, supra.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Whether Plaintiff acquired a property interest during her employment at Auburn is controlled by Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972).

In Sindermann, the Supreme Court set forth a two-tiered analysis for determining whether a faculty member has acquired a constitutionally-protected property interest requiring procedural due process protection. First, the court must inquire whether there exists an explicit tenure provision clearly evidencing a formal understanding that supports the Plaintiff faculty member's claim of entitlement. Second, in the absence of such an explicit tenure provision, the Court must determine whether applicable State law creates a legitimate claim of entitlement to continued employment.

Courts have rejected the notion that de facto tenure or de facto continued employment can be achieved where there

exists an established tenure system, which by its terms, does not expressly and unequivocally incorporate the concept of de facto tenure. e.g., Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981); McEleaney v. University of Illinois at Chicago, 612 F.2d 285 (7th Cir. 1979) ("against the background of formal, explicit rules governing the tenure status of faculty members, the representations (of a department head) *** do not create a property interest in employment"); Haimowitz v. University of Nevada, 579 F.2d 526 (9th Cir. 1978) ("the existence of a formal code governing the granting of tenure precludes a reasonable expectation of continued employment absent extraordinary circumstances"); Plummer v. Board of Regents, 552 F.2d 716 (6th Cir. 1977);

Bertot v. School District No. 1, 552 F.2d 1171 (10th Cir. 1975); Cusumano v. Ratchford, 407 F.2d 980 (8th 1974)(interpreting the effect of 1940 Statement of Principles); Sheppard v. West Virginia Board of Regents, 378 F.2d 4 (4th Cir. 1974).

In the instant case, it is undisputed that Defendant Auburn University had an explicit procedure for conferring tenure at all times material herein and that Auburn's procedure required more than Plaintiff provided.

The Supreme Court of Alabama has observed:

"An implied contract arises where there are circumstances

> which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract." Hendrix,Mohr & Yardley v. City of Daphne, 359 So.2d 792 (Ala. 1978).

It is undisputed that, during the fall of 1978, Plaintiff submitted several proposals and eventually agreed to a procedure for acquiring an advanced degree as a condition of continued employment. This course of conduct, and Plaintiff's subsequent action in 1981 in conjunction with the submission and processing of her tenure application in accordance with Auburn's established tenure procedure, do not support Plaintiff's claim of an implied

contractual right to de facto tenure and continued employment. Under State law, "where the acts and conduct of one party inconsistent with the existence of a contract are acquiesced in by the other, such contract will be treated as abandoned or rescinded." Watts Construction Co. v. Cullman County, 382 So.2d 520, 522 (Ala.1980).

All of Plaintiff Mayfield's claims for relief are without merit. Accordingly, judgment will be entered for the Defendants.

DONE this 18th day of November, 1983.

R. L. VARNER
UNITED STATES DISTRICT JUDGE

Office - Supreme Court, U.S.
FILED
MAY 29 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1769

IN THE

Supreme Court Of The United States

October Term, 1984

LIDA K. MAYFIELD,
Petitioner,

vs.

AUBURN UNIVERSITY, BOARD OF TRUSTEES OF AUBURN UNIVERSITY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Should certiorari be granted to review a judgment of a court of appeals which, after full briefing and oral argument, affirmed a judgment of a district court which the appellate court determined was based on findings of fact that were not clearly erroneous and in which no error of law appeared, and then denied rehearing and suggestion for rehearing en banc; the trial court having determined that petitioner, a faculty member, who had not been granted tenure at Auburn University which had and followed a formal tenure process, and who had appealed to the President of the University and was denied tenure, had suffered no deprivation of any constitutional right?

2. Should certiorari be granted to review a judgment of a court of appeals, which affirmed the district court judgment holding that Auburn University had "an explicit procedure for conferring tenure at all times," and that the tenure process, with appeal to and determination by the President of the University, did not violate any constitutional right of Petitioner?

3. Should certiorari be granted to review a judgment of a court of appeals, which is consistent with decisions of other federal appellate courts and is not in conflict with applicable decisions of this Court?

4. Should certiorari be granted to review a judgment of a court of appeals which affirmed the judgment of a district court which is not clearly erroneous in fact or contrary to law?

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinions and judgments of the courts below are set forth in the Appendix to the Petition.

JURISDICTION

Jurisdiction is based upon 28 U.S.C. § 1254(1). Respondents submit, however, that this is not a proper case meriting review on writ of certiorari.

STATEMENT OF THE CASE

The statement of the case by Petitioner is incomplete and respondents refer to the District Court's opinion, which appears as Appendix "C" (A5) to the Petition.[1] Petitioner's statement of "relevant evidentiary facts" is incomplete, and in part inaccurate, and Respondents refer to the District Court's opinion and further point out:

Petitioner does not state the fact that when the eligible members of the music faculty voted as to whether petitioner should be considered for tenure, there were seven negative votes, five positive votes, and two abstentions. When she was placed in the tenure process before the tenure and promotion committee, of the fourteen members of the music department faculty, eleven recommended against and three recommended for the granting of tenure. The Dean and the Head of the Department also added their recommendations against the award of tenure.

Petitioner does not state that the evidence clearly shows that she was familiar with the tenure process and that she knew that the recommendations of her peers, her fellow faculty members, were important to the granting or denial of tenure. The quotation from the Faculty Handbook (Petition, p. 10), is incomplete and fails to quote the following part of the provisions:

> "Faculty and department heads should remember that decisions on tenure are different in kind from those on promotion. Although the nominee's teaching, service, and scholarly credentials are important elements in the nomination, recommendations should also be based on factors that are directly related to the prospect of the nominee's

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[1]The District Court's opinion as reproduced at Petitioner's Appendix "C" omits a portion of the text at Appendix A33. Following the word "corrected" on the second to last line, the following appears in the opinion: ". . . . .before utilizing the information from the cards. He explained that the errors were situations where the cards had been punched between the numbers, as where a punch should have been on the number 3 but it appeared between the numbers 3 and 4. He assured the Court nonspecifically that these errors had been corrected. . . . ."

> assuming what may well be an appointment of ten, twenty or thirty years in the department unit: Are the nominee's abilities compatible with the departmental mission and with its long-term goals? Is the nominee compatible with colleagues? Has the nominee exhibited an ability and willingness to engage in shared tasks that a departmental group must often perform and to participate with some measure of reason in discussions germane to departmental policies and programs?"

The statement on Page 11 of the Petition that the Tenure and Promotions Committee made the decision "without having heard at all from Mrs. Mayfield," and that she didn't know when she had been placed "up for tenure consideration" is inaccurate. The fact is that Mrs. Mayfield submitted ninety-three pages of material for consideration by the Committee, which was considered and reviewed by all the Committee before it determined that "she not be recommended for tenure," and transmitted its recommendation to the President of the University. The President accepted the recommendation and Mrs. Mayfield was notified. Dr. Littleton, the Chairman of the Tenure and Promotions Committee, met with Mrs. Mayfield and agreed to, and did, synthesize the reasons for the negative recommendations and furnished it to her and fully cooperated with her to provide her assistance with an appeal. Mrs. Mayfield exercised her right of appeal, as provided by the Faculty Handbook, to the President of the University, and submitted with her appeal extensive comments, observations and documents. Petitioner incorrectly asserts as a fact (Petition, p. 12) that "instead of deciding her appeal, he sent it back to the Tenure and Promotion Committee."

The fact is that Dr. Funderburk, the President, reviewed the appeal and the substantial amount of material submitted by Mrs. Mayfield, including "biographical material, resume, letters, things of that nature." Dr. Funderburk, called as a witness by petitioner, testified: "Q. Did you, yourself, review that material - - - - ? A. Yes."

Dr. Funderburk reviewed the appeal and all matters sub-

mitted, and denied the appeal, and notified Mrs. Mayfield accordingly on July 13, 1981:

> "I regret to inform you that the appeal of the original negative decision on your tenure has been denied. This decision was reached following a thorough review of your appeal and also after securing an additional advisory opinion from the Committee on Tenure and Promotion. The contents of the appeal did not contain evidence sufficiently persuasive to change the earlier decision. Again, I regret having to communicate this to you." (DX 16, last numbered page). (RV1, p. 77).

Following this, in accordance with university policy and procedure, Mrs. Mayfield was notified that her yearly contract would not be renewed at the end of the next academic year.

At the trial in District Court, all members of the Music Department faculty were tendered for testimony and cross-examination. The Court found (Petition, Appendix C at p. A17):

> "The testimony of the tenured faculty in the Music Department showed overwhelmingly that, while Plaintiff participated in group music educational programs on many occasions, she refused on many occasions to inconvenience herself, that she was publicly and unnecessarily critical of fellow faculty members in a way so as to weaken the program, and that she was extremely harsh in her criticism of some of her students. Elements to be considered in tenure decisions are, among others, (1) compatibility with colleagues, (2) compatibility with departmental mission and goals, and (3) ability and willingness to engage in shared tasks that a departmental group must often perform (Defendants' Exhibit 32, p. 23)."

The district court found the facts in favor of the Respondents, found that petitioner's claims were without merit, and entered judgment accordingly. The Court of Appeals, having the massive record before it, and after full briefing and oral argument, affirmed the lower court's judgment without opinion under 11th Circuit Rule 25, which provides:

> "When the court determines that any of the following circumstances exist:

"(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

* * * * *

"and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."

Petition for Rehearing and Suggestion for Rehearing en banc were denied.

REASONS WHY PETITION SHOULD NOT BE GRANTED

There are no special or important reasons for granting a writ of certiorari. The decision below does not conflict with decisions of other federal courts, and does not conflict with applicable decisions of this court. As to the facts, the court below correctly applied the standards of Rule 52(a) F.R.C.P. in determining that the findings of fact were not erroneous.

Auburn University has an explicit tenure program and procedure which the court found was followed in this case. The court's decision is clear that Petitioner was given every opportunity to prove her claims and failed to do so.

The court's decision is consistent with the decisions of this court in *Perry v. Sinderman,* 408 U.S. 593 (1972) and *Board of Regents v. Roth,* 408 U.S. 564 (1972).

Federal courts of appeal have rejected the notion that de facto tenure can be achieved where there exists an established tenure system. For example, *Haimowitz v. University of Nevada,* 579 F.2d 526, at p. 528 (8th Cir. 1978), passed upon a case where a faculty member was at all times fully aware of his status as an employee who could achieve tenure only in accordance with the published formal tenure regulations, stating at p. 528:

"The entire thrust of formal tenure provisions is to standardize the process of faculty selection and employment security. In other words, formal tenure regulations

are designed to avoid the *de facto* tenure problem recognized in *Perry*."

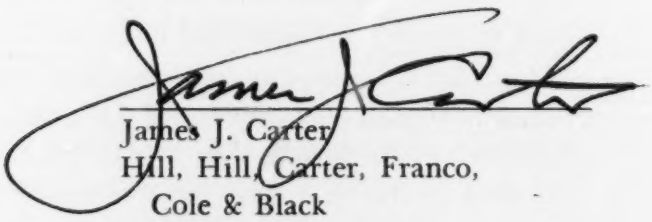
Other cases cited by the district court include: *McElearney v. University of Illinois, etc.,* 612 F.2d 285, at p. 291 (7th Cir. 1979); *Beitzell v. Jeffrey,* 643 F.2d 870, at pp. 874-875 (1st Cir. 1981); *Plummer v. Board of Regents,* 552 F.2d 716 (6th Cir. 1977); *Bertot v. School District No. 1,* 522 F.2d 1171 (10th Cir. 1975); *Cusumano v. Ratchford,* 507 F.2d 980 (8th Cir. 1974); cf *Willens v. University of Massachusetts,* 570 F.2d 403 (1st Cir. 1978).

Within the established Considerations Governing Review on Writ of Certiorari, U.S. Supreme Court Rule 17, there are no special or important reasons for granting a writ of certiorari in this case.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James J. Carter, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of The United States, hereby certify that on the 27 day of May 1985, I served the foregoing Brief of Respondents in Opposition to the Petition for a Writ of Certiorari upon the Petitioner by mailing three copies thereof by United States Mail, first class postage prepaid, and addressed to the attorney for Petitioner, as follows:

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